IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27.10.2006

Coram

The Honourable Mr. JUSTICE K.MOHAN RAM

Civil Miscellaneous Appeal No.1988 of 1999

National Insurance Co. Ltd.,
74-A Namakkal Appellant/R2

-Vs.-

1. K.Ramasamy
2. Dhanalakshmi
3. K.Narayanasamy
4. K.Kaliyamourthy .... Respondents/Petitioner 1 to 4

APPEAL against the judgement and decree made in MCOP No.490 of 1995 dated 16.08.1999 on the file of the Motor Accident Claims Tribunal, Principal District Court, Tiruvannamalai.

For Appellant : Mr. M.Vijayaraghavan.
For Respondents : No Appearance.

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J U D G E M E N T

The second respondent-Insurer in MCOP No.490 of 1995 on the file of the Motor Accident Claims Tribunal (Principal District Judge), Tiruvannamalai being aggrieved by the award dated 16.08.1999 made therein has filed the above appeal.

2. The learned counsel for the respondent is absent.

3. The only ground on which the above appeal has been filed is that the driver of the LPG tanker lorry bearing registration No.HR38-4456 belonging to the fifth respondent herein and which is involved in the accident causing the death of one Durai, who was the cleaner of the lorry bearing registration No.TMS 3317, was not authorised to drive heavy vehicles carrying hazardous goods as required by Rule 9 of Central Motor Vehicles Rules 1989 (hereinafter referred to as "the Rules").

4. The learned counsel for the appellant submitted that though the driver of the tanker lorry involved in the accident was holding Ex.R-2-licence to drive a heavy goods vehicle, no endorsement has been made in the driving licence-Ex.R-2 as contemplated in Rule 9(3) of the Rules.

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5. Rule 9(1) of the Rules prescribes educational qualifications for drivers of goods carriages carrying dangerous or hazardous goods, period of training, place of training, syllabus, etc., which reads as follows:

> "9(1) One year from the date of commencement of Central Motor Vehicles (Amendment) Rules, 1993, any person driving a goods carriage carrying goods of dangerous or bazardous nature to human life shall, in addition to being the holder of a driving licence to drive a transport vehicle, also has the ability to read and write at least one Indian language out of those specified in the VIII Schedule of the Constitution and English and also possess a certificate of having successfully passed a course consisting of following syllabus and periodically connected with the transport of such goods.
>
> Period of Training — 3 days
> Place of Training — At any institute recognised by the State Government.
>
> Syllabus
>
> A. Defensive driving
> Questionnaire Duration of training for A and B
> Cause of Accidents - 1st and 2nd day
> Accidents' statistics
> Driver's personal fitness
> Car condition
> Braking distance
> Highway driving
> Road/Pedestrian crossing
> Railway crossing
> Adapting to weather
> Head-on collision
> Rear-end collision
> Night driving
> Films and discussion
>
> B. Advanced driving skills and training
> (i) Discussion
> Before starting - check list.
> - outside/below/near vehicle
> - product side
> - inside vehicle.
> During driving - correct speed/gear
> - signalling
> - lane control
> - overtaking/giving side
> - speed limit/safe distance
> - driving on slopes.

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Before stopping - safe stopping place, signalling, road width, condition.
- preventing vehicle movement
- wheel clocks

Night driving - vehicle attendance
- mandatory lighting requirements
- Headlamp alignment
- Use of dipped beam

(ii) Field test/training - 1 driver at a time

C. Product safety

U.N.Panel
- UNclassification
- Hazchem code
- Toxicity, flammability, other definitions

Duration of training for (c) Third day

Product Information - Tremcards
- CIS/MSDS
- Importance of temperature pressure, level
- Explosive limits
- Knowledge about equipment

Emergency Procedure - Communication
- Spillage handling
- Use of PPE
- Fire fighting
- First Aid
- Toxic release control
- Protection of wells, rivers, lakes, etc.,
- Use of protective equipment
- Knowledge about valves etc."

Rule 9(2) of the Rules prescribes the procedure for making the application for necessary entries in the driving licence.

Rule 9(3) of the Rules, reads as follows:-

> "The licensing authority, on receipt of the application referred to in sub-rule (2), shall make an endorsement in the driving licence of the applicant to the effect that he is authorised to drive a goods carriage carrying goods of dangerous or hazardous nature to human life".

6. A reading of Rule 9(1) of the Rules shows that any person driving a goods carriage carrying goods of dangerous or hazardous nature to human life shall possess the requisite educational qualifications prescribed therein and

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should undergo the training prescribed therein within one year from the date of commencement of Central Motor Vehicles (Amendment) Rules, 1993. The learned counsel for the appellant submitted that since The Central Motor Vehicles (Amendment) Rules 1993 was brought into force with effect from 26.03.1993 and the accident in question has occurred on 13.02.1995, Rule 9(1) of the Rules can be taken advantage of by the appellant and raise the defence that the driving licence of the driver of the tanker lorry does not contain the necessary endorsement as contemplated in Rule 9 of the Rules and avoid its liability.

7. In support of the submissions made by the learned counsel for the appellant he relied upon a Division Bench decision of this Court rendered in the case of Kumar (Minor), rep. by his father & next friend Manickam Vs. National Insurance Company Limited reported in 2002 (4) Law Weekly 691. In the said decision it is observed as follows:-

> "The driving licence which the driver is required to hold when the motor vehicle is used in a public place is the licence to drive the particular type of vehicle and not merely the licence to drive any other type of vehicle. The classification of vehicles in the Act is such that though the heavy passenger vehicle as also the heavy goods vehicle are transport vehicles, nevertheless they form distinct categories and the licence which a person intending to drive these vehicles is required to obtain is a licence issued with reference to the particular class of vehicle. A licence issued which permits the driving of a heavy passenger vehicle is not a licence issued for the purpose of driving a heavy goods vehicle. Even though it may appear that a person, who knows how to operate the controls of a heavy motor vehicle and has been driving a heavy vehicle which carries passengers, would have the necessary skill to drive a heavy goods vehicle, the driving of the heavy goods vehicle by a person who does not possess a licence which enables him to drive that type of vehicle would be a breach of Section 3 of the Motor Vehicles Act. For the purposes of the Act, such a person cannot be regarded as one who had the valid or effective Driving Licence".

Placing reliance on the said observation of the Division Bench the learned counsel for the appellant submitted that in this case since the driving licence of the driver of the tanker lorry viz., Ex.R-2 does not contain the necessary endorsement as contemplated in Rule 9 of the Rules it will amount to breach of conditions of the policy of insurance and as such the appellant insurer is not liable to indemnify the insured viz., the owner of the tanker lorry.

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8. The learned counsel further relying upon the decision of the Honourable Supreme Court of India rendered in the case of National Insurance Company Vs. Swaran Singh and others and reported in 2004 ACJ 1 submitted that the appellant may be directed to pay the award amount and permitted to recover the same from the insurer.

9. A close reading of the decision reported in 2002(4) Law Weekly 691 (referred to supra) shows that in that case the driver of the vehicle involved in the accident was licensed to drive heavy passenger vehicles only, but he drove a lorry which was a heavy goods vehicle and in that context the Division Bench held that the driving of the heavy goods vehicle by a person who does not possess a licence which enables him to drive that type of vehicle would be a breach of Section 3 of the Motor Vehicles Act and for the purposes of Act, such a person cannot be regarded as one who had the valid or effective driving licence. But in the case on hand the facts are different. It is not the case of the appellant that the driver of the tanker lorry was not having a licence to drive the heavy goods vehicle. But the only contention was that the necessary endorsement as provided in Rule 9 of the Rules has not been made in the licence. A perusal of Ex.R-2-licence shows that the driver-P.Kumar who drove the tanker lorry has got a licence to drive heavy goods vehicle and there is an endorsement in Ex.R-2 that he was a military driving licence holder. But it is no doubt true that the endorsement as prescribed under Rule 9 of the Rules is not found in Ex.R-2-licence. Hence it has to be considered as to whether the absence of such an endorsement in Ex.R-2 would enable the appellant/insurer to avoid its liability to indemnify the insured.

10. In 2004 ACJ 1 (referred to supra) the Honourable Supreme Court has laid down as follows:-

> "82. .... In each case on evidence led before the Claims Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence". (emphasise supplied)
>
> 83. We have construed and determined the scope of sub-clause (ii) of sub-section (2) (a) of Section 149 of the Act. Minor

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breaches of licence conditions, such as want of medical fitness certificate, requirement about age of the driver and the like not found to have been the direct cause of the accident, would be treated as minor breaches or inconsequential deviation in the matter of use of vehicles. Such minor and inconsequential deviations with regard to licensing conditions would not constitute sufficient ground to deny the benefit of coverage of insurance to the third parties". (emphasise supplied)

In the same decision, the summary of the findings of the Honourable Supreme Court in paragraphs 102 (iii), (iv) and (vi) reads as follows:-

"102 (iii) The breach of policy conditions, e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section 2(a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time".

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence (s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle, the burden of proof wherefor would be on them.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches of the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply 'the rule of main purpose' and the concept of 'fundamental breach' to allow defences available to the insurer under

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Section 149(2) of the Act".

11. Before applying the above said principles to the facts of this case, it will be useful to refer to the conditions contained in the Insurance policy-Ex.R-3 issued in respect of the LPG tanker lorry involved in the accident. In Ex.R-3 against column 'persons or classes of persons entitled to drive', it is stated as follows:-

> "Any persons including insured PROVIDED that a person driving holds an effective driving licence at the time of the accident and is not disqualified from holding or obtaining such a licence".

Ex.R-3 policy was effective for the period 30.05.1994 to 29.05.1995 and the accident has occurred on 13.02.1995 and the policy had been issued on 30.05.1994. The above said condition contained in Ex.R-3-Policy does not contemplate that the driver of the LPG tanker lorry should obtain the endorsement as provided for in Rule 9 of the Rules. The condition only stipulates that a person driving the tanker lorry should hold an effective driving licence at the time of the accident and is not disqualified from holding or obtaining such a licence.

12. In this case it is not the contention of the learned counsel for the appellant that the driver of the LPG tanker lorry who was licensed to drive the heavy goods vehicle was not holding an effective driving licence to drive the tanker lorry at the time of accident and therefore in the considered view of this Court the absence of endorsement in Ex.R-2 as provided for in Rule 9 of the Rules will not enable the appellant/insurer to avoid its liability to satisfy the decree passed by the tribunal.

13. Even otherwise the absence of endorsement as provided for in Rule 9 of the Rules in Ex.R-2-licence will not enable the insurer/appellant herein to avoid its liability for the following reasons:-

(i) In 2004 ACJ 1 (referred to supra) the Honourable Supreme Court has observed that if on facts, it is found that accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having nexus with driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence. In the same decision, it has been further observed that minor breaches of licence conditions, such as want of medical fitness certificate, requirement about age of the driver and the like not found to have been the direct cause of the accident, would be treated as minor breaches or inconsequential deviation in the matter of use of vehicles and such minor and inconsequential deviations with regard to licensing conditions would not constitute sufficient ground of denying benefit of coverage of insurance to the

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third parties.

(ii) If the facts of the case on hand are considered in the light of the above said observations of the Honourable Supreme Court, it has to be pointed out that it has not been established by acceptable evidence that the want of above said endorsement was the main or contributory cause for the accident. The absence of the said endorsement in the driving licence-Ex.R-2 is only a minor and inconsequential deviation with regard to licensing conditions and therefore it would not constitute sufficient ground to deny the benefit of coverage of insurance to the third parties. Further, it has to be pointed out that to avoid its liability to the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time. The insurer must also establish "breach" on the part of the owner of the vehicle and the burden of proof wherefor would be on the insurer. Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant time, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches of the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident.

(iii) In this case the insurer/appellant herein has not established breach on the part of the owner of the vehicle. In the considered view of this Court the absence of the said endorsement in Ex.R-2-licence is not so fundamental. Further it has neither been pleaded nor established by acceptable evidence that failure on the part of the holder of Ex.R-2-licence to undergo the training prescribed under Rule 9 of the Rules is in any way contributed to the cause of the accident. The main purpose of the qualification and training prescribed in Rule 9 of the Rules seems to equip the driver of the tanker lorries transporting hazardous substances to meet certain emergencies and to make him aware of certain basic emergency procedures, in case if any spillage of hazardous substances transported in the vehicle is caused due to an accident. In this case the evidence discloses that the tanker lorry was driven rashly and negligently by its driver and hit against the deceased who was attending to the tyre of the lorry in which he was working as a cleaner near the lorry which was parked on the side of the road. The failure on the part of the driver of the tanker lorry to undergo the training prescribed under Rule 9 of the Rules does not seem to have in any way contributed to the cause of the accident. The Tribunal has recorded a finding of negligence on the part of the driver of the tanker lorry. The evidence on record does not show that the

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absence of endorsement under Rule 9 of the Rules in Ex.R-2-licence has contributed to the accident. Hence in the light of the law laid down by the Apex Court in 2004 ACJ 1 (referred to supra) it has to be held that the insurer/appellant herein is not entitled to avoid its liability to indemnify the insured and the contention of the insurer is liable to be rejected.

14. For the reasons stated above, the appeal fails and the same is dismissed. However, there will be no order as to costs.

srk

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

The Motor Accident Claims Tribunal,
Principal District Court, Tiruvannamalai.

2. The Record Keeper, VR Section, High Court
Madras

+ one cc to Mr. N. Vijayaraghavan, Advocate sr no. 50374

GM(CO)
NM(18.12.2006)

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